



**FORMATIVE ASSESSMENT: MODULE 1**

**INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW**

*This is a formative assessment relating to Module 1 and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is not compulsory and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.*

*The Marking Guide for this assessment will be made available on the web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2023.*

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment1formative]. An example would be something along the following lines: 202223-336.assessment1formative. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 15 October 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 15 October 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 10 pages.**

**ANSWER ALL THE QUESTIONS**

QUESTION 1 (multiple-choice questions) [10 marks in total]

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow.** Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

***It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.***

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.***
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.***
- (c) This statement is true since all systems have at least the same general insolvency concepts.***
- (d) The statement is true since the historical roots of all insolvency systems are the same.***

Question 1.2

***The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.***

- (a) This statement is true since this Act introduced imprisonment of debt.***
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.***
- (c) This statement is true since it introduced the notion of discharge.***

***(d) This statement is true since it introduced fraudulent conveyances into English law.***

Question 1.3

***The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.***

***(a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.***

***(b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.***

***(c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.***

***(d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.***

Question 1.4

***Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.***

***(a) This statement is true since business rescue is important for socio-economic reasons.***

***(b) This statement is true because liquidation is viewed as a medieval and outdated process.***

***(c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.***

***(d) This statement is untrue since some systems have no formal rescue procedure.***

Question 1.5

***The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions - hence these do not pose problems in a cross-border insolvency matter.***

**(a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.**

**(b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.**

**(c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.**

**(d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.**

Question 1.6

**The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.**

**In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?**

**(a) Public International Law.**

**(b) UNCITRAL Legislative Guide on Insolvency Law.**

**(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.**

**(d) Private International Law.**

Question 1.7

**Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?**

**(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).**

**(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).**

**(c) UNCITRAL Model Law on Cross-border Insolvency (1997).**

**(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).**

Question 1.8

**Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.**

**Which of the following conventions and treaties does not provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?**

**(a) Montevideo Treaty on International Commercial Law (1889).**

**(b) Montevideo Treaty on International Commercial Terrestrial Law (1940).**

**(c) Montevideo Treaty on International Procedural Law (1940).**

**(d) Havana Convention on Private International Law (1928).**

Question 1.9

**The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.**

**Which of the following aspects of international insolvency is not addressed in the EIR Recast?**

**(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.**

**(b) Definition of "centre of the debtor's main interests".**

**(c) A centralised insolvency register of insolvency proceedings opened in member states.**

**(d) Co-operation and co-ordination provisions applicable to corporate groups.**

Question 1.10

**An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?**

**(a) The local Court's jurisdiction over the Debtor.**

**(b) The standing of the foreign Creditor to sue for its debt in the local Court.**

**(c) The foreign liquidator's standing to request a stay of the local proceedings.**

**(d) The fact that the debt owed to the Creditor is in a foreign currency.**

Marks awarded: 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

**Explain what the term "international insolvency law" means.**

**In the current times, the financial distress of firms or companies transcends territorial borders due to an unprecedented increase in enterprise between States. A simple definition of 'international insolvency law' can be drawn from Mevorach's<sup>1</sup> work: law regulating the treatment of financial distress of debtors who have a presence or connection to more than one country. Prof. Wessels defines it as a body of rules which govern insolvency proceedings but cannot be enforced fully without referring the applicable law to the international aspect of the given case.<sup>2</sup> Prof. Fletcher provides that international insolvency**

<sup>1</sup> Irit Mevorach, *The Future of Cross Border Insolvency: Overcoming Biases and Closing Gaps* (OUP, 2018)

<sup>2</sup> Bob Wessels, *International Insolvency Law* (Kluwer, 2006)

*law regulates those circumstances in insolvency which transcend the limitations of one legal system in a manner that domestic law provisions cannot respond immediately without regard to the issues raised by the foreign elements of the case.<sup>3</sup> This is due to several factors: (a) A debtor may have dealings with foreign parties; (b) may own or have interest in property situated outside debtor's home jurisdiction; (c) the debtor owes liabilities to parties which belong to foreign countries; (d) obligations are governed by foreign law, or incurred abroad, or the performance of debtor's obligations must happen abroad.<sup>4</sup> In all of these situations, an insolvency proceeding may be opened in more than one country, which raises questions of choice of forum, enforcement & recognition and choice of law, thereby bestowing an international character to insolvency proceedings. For instance, an insolvency proceeding can be open in one State, but the creditor is situated in another State. Further, circumstances involving subsidiaries, assets in multiple States, business operations in several States, etc., adds to the complexities associated with cross-border insolvency.*

2

Question 2.2 [maximum 5 marks]

***Differentiate between the concepts of universality and territoriality in cross-border insolvency.***

*The fundamental principles of universality & territoriality are derived from two philosophical underpinnings: Unity and plurality. Unity of Bankruptcy argues against the sub-division of insolvency proceedings into two or more proceedings. Diametrically opposite to it, plurality accepts the possibility of a plurality of proceedings under different States and their laws. The former forms the basis of Universality, while the latter forms the basis for territoriality.*

*The principle of universality advocates for one insolvency proceeding which would cover all debtors' assets & debts globally. This proceeding must be commenced in the centre of main interest (COMI) of the debtor, and once opened, no other insolvency proceedings or action against the debtor's property shall be allowed anywhere. Prof. Omar points out that the choice of forum under this idea is based on the debtor's domicile or the company's place of incorporation or seat. This principle envisages the extra-territorial effect of a single set of proceedings in all jurisdictions. Under this principle, courts of the State (where proceedings are opened) apply their national laws in order to decide between reorganisation or liquidation or priority of payments. All assets are collected and distributed equally among all creditors, local & foreign. Courts in foreign countries must render assistance to the main forum. This is also a multilateral approach to the choice of applicable law, whose main aim is the unity of the debtor's estate, unity of the body of creditors and the universal effect of incapacity of the debtor. LoPucki remarks that in Universality, one court plays*

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<sup>3</sup> I Fletcher, *Insolvency in Private International Law* (OUP, 2<sup>nd</sup> ed, 2005)

<sup>4</sup> *ibid*



*the tune, and everyone else dances.<sup>5</sup> This principle is appreciated because it is simple, cost-effective (saves from the multiplicity of proceedings) and also time efficient (speedy). It also provides a solution for forum shopping, albeit only theoretically.<sup>6</sup> However, common points of criticism for this principle are: (a) varying national law approaches to bankruptcy; (b) how to choose which country to start the proceeding in; (c) manipulation of the choice of home country standard: moving to more debtor-friendly States or forum shopping.<sup>7</sup> It also requires high level of international cooperation.*

*Territoriality refers to the limitations of the effect of insolvency proceedings on such property as is situated within the territorial jurisdictions of the country where proceedings are open. This principle is based on the principle of plurality, i.e., it encourages the commencement of insolvency proceedings in every State where the debtor holds any property or assets. The restrictions under this principle apply regarding the filing of claims by creditors and the mandate of the Insolvency Professional/representative. This principle largely focuses on the national interest as a priority before moving any assets abroad.<sup>8</sup> It addresses the 'choice of forum' question by permitting a court to exercise jurisdiction over any debtor who satisfies the conditions of the local insolvency law. Once the choice of forum is established, choice of law is decided. This theory has no extra-territorial reach. This theory is embedded deeply in the idea of 'State Sovereignty'. Proceedings in one state do not affect proceedings in other states. The advantages of this approach are simplicity, effectiveness & predictability. It also permits local recognition of foreign actions or claims. However, territoriality also poses some fundamental challenges, like there is a multiplicity of proceedings, which means there is constant re-litigation. The number of proceedings would be directly proportional to the number of States. This increases costs for the creditors as well as time. This principle is criticised for contravention of the equality principle of creditors as local creditors can prove locally, while others cannot. This is why it is also called 'grab rule'. Other challenge that presents itself under this theory is situations where a debtor is solvent in one and insolvent in another? Thus, the theories keep oscillating between local protection versus international cooperation.*

5

Question 2.3 [maximum 3 marks]

**Describe three recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency issues.**

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<sup>5</sup> Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 Cornell L. Rev. 696 (1999) Available at: <http://scholarship.law.cornell.edu/clr/vol84/iss3/2>

<sup>6</sup> Paul J Omar, *International Insolvency Law, Themes & Perspectives* (Routledge, 1<sup>st</sup> edn, 2008)

<sup>7</sup> LoPucki n 5;

<sup>8</sup> Omar n 6;

1. Reorganisation and Bankruptcy Law (Bahrain Law No. 22/2018) – May 2018 – ***The Kingdom of Bahrain adopted the Model Law on Cross-Border Insolvency (MLCBI), which promotes value maximisation, rescue, and restructuring in the place of immediate liquidation. It provides for a debtor-friendly system, which follows Chapter 11 of US Bankruptcy Code.***<sup>9</sup>
2. DIFC Insolvency Law, Law No. 1 of 2019, UAE (Offshore) - ***The new law departs from its previous approach and adopts voluntary arrangements, rehabilitation of debtors, and provisions regarding enforcement and recognition of foreign insolvency proceedings.***  
 UAE Bankruptcy Law, Law No. 9 of 2016 (Onshore) - ***Amendments made in 2021 in the law in UAE is based on MLCBI and provide for preventive compositions & restructuring.***<sup>10</sup>
3. Saudi Arabia’s Royal Decree No. M05/2018 (the “KSA Bankruptcy Law”) - ***provides for a hybrid approach giving debtors the flexibility to choose whether or not to remain in possession of the business. This is called Protective Settlement. Under formal restructuring, it adopts Chapter 11 procedures.***

3

Marks awarded 10 out of 10

### QUESTION 3 (essay-type questions) [15 marks in total]

#### Question 3.1 [maximum 5 marks]

***Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.***

*The objectives of personal & corporate insolvency, albeit governed by common principles (like *Pari passu* distribution, equitable treatment of creditors & debtor, understanding reasons of failure and reclaiming avoided dispositions), are different.*

Individual Insolvency: ***The key design policy under this is discharge, which releases the debtor from past financial obligations and also protects them from adverse effects that may come with it.***<sup>11</sup> *Sealy & Hooley*<sup>12</sup> ***consider the following objectives relevant:***

- (a) To protect debtors from harassment by creditors - ***Creditors or third parties acting on behalf of creditors may attempt to harass the debtor by threatening them, publicly shaming them, excessive communication, and constant legal threats, to name a few. In such situations, the individual insolvency law regulates creditor behaviour. For instance, the Fair Debt Collection Practices Act (FDCPA) in USA, through the Consumer Financial Protection Bureau, provides rules for regulating creditor behaviour in case of insolvency of debtor.***
- (b) Discharge/Fresh Start - ***Unless the debtor has violated some norm of behaviour under insolvency law, they can obtain a discharge from most of his existing***

<sup>9</sup> <https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-9-2018/bahrains-new-bankruptcy-law-pdf.pdf>

<sup>10</sup> <https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2022/article/shifting-sands-the-move-towards-restructuring-in-the-uae>

<sup>11</sup> Thomas H Jackson, *The Logic & Limits of Bankruptcy Law*, Harvard University Press, 1986

<sup>12</sup> In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017)

*debts, providing them with an opportunity to start afresh, especially in cases where the insolvency is brought about by factors beyond the debtor's control.*

- (c) To reduce the indebtedness by making contributions from present & future income to the estate while considering their personal circumstances. **USA Bankruptcy law, based on whether the debtor uses Chapter 7 or Chapter 13, allows for discharge in exchange of surrendering his existing non-exempt assets or, a portion of his future earnings.<sup>13</sup> This also contributes to their overall economic stability.**

Corporate Insolvency: **The key design policy under this is the preservation of business and liquidation if the company is viable.**

- (a) Allocation of risk among participants - **the overarching objective of insolvency is to foster economic growth for all participants, including creditors. It also allocates risk among different creditors in a predictable, equitable and transparent manner. This reduces the risk of lending & increases the availability of credit.**
- (b) To preserve business or viable parts of the business, not just the company - **the aim of corporate insolvency is to rescue the business or parts thereof through restructuring of debt, operations, or ownership to facilitate business & lower the loss of employment.**
- (c) Maximizing value for creditors - **The corporate insolvency law is designed to protect and maximize value for the benefit of all interested parties and the economy in general.<sup>14</sup> This includes equitable treatment of creditors & satisfaction of their claims to the fullest extent possible.**
- (d) Imposition of personal liability - **Insolvency can be a consequence of irresponsible business practices. One of the key objectives of this law is to identify the people (directors, officers) responsible for the distress in the company and impose personal liability upon them for causing such distress.**

There is some scope to discuss exempt property.

4.5

Question 3.2 [maximum 5 marks]

**Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.**

*When dealing with cross-border insolvency, several issues arise since national insolvency systems are different in their approach towards the subject. The fundamental difficulty in cross-border insolvencies are the absence of global insolvency law systems and courts to resolve insolvency matters where more than two countries are involved. Secondly, every country takes a different approach to insolvency issues. Some countries believe in unity, thereby taking a universalist approach to cross-border insolvency (single proceeding in one State having extra-*

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<sup>13</sup> Jackson, n 11, chap 10

<sup>14</sup> <https://www.elibrary.imf.org/display/book/9781557758200/ch02.xml>

*territorial effects), while other countries might take a more conservative approach of territoriality, focused on national interest. Such countries encourage a plurality of proceedings in every country where the assets of the debtor are situated. Furthermore, countries may be debtor-friendly (inclines towards alleviation of debtor's predicament) or creditor-friendly (amelioration of creditors exposure to losses).<sup>15</sup>*

*According to Friman, finding a common insolvency language is also a difficulty. Insolvency can be a balance sheet insolvency (based on assessed valuations of the totality of assets & liabilities) or a cash flow insolvency (predicated on debtors' inability to pay the debts as they fall due). This is also termed a liquidity crisis. Since every country has its own definition of insolvency, there is no generally agreed-upon definition globally. Even conventions and treaties find it much easier to define 'insolvency proceedings' but not 'insolvency'.*

*Further, all cross-border insolvencies give rise to conflict of law issues. In order to resolve this, the conceptual matrix of private international law is transposed on insolvency matter to answer the three most pertinent questions raised by Fletcher -*

- (a) In which jurisdiction may insolvency proceedings be opened?*
- (b) What countries rule of law must be applied to identify the issues to be resolved?*
- (c) What are the international effects of the proceedings conducted at one place - enforcement & recognition.<sup>16</sup>*

*Prof. Westbrook has identified 9 key issues that arise in cross-border insolvency. Since he is also a universalist, we find elements of universalism in his approach to identification of issues -*

- (a) Recognition of Foreign Representative/Insolvency Professional by the country where insolvency proceeding is opened and in foreign countries where assets of the debtor may be situated;*
- (b) Automatic stay or Moratorium on all creditor actions - this becomes a problem if a certain country takes a territorial approach.*
- (c) Creditor participation - gathering creditors claims is a herculean task facing the insolvency representative in cross-border cases.*
- (d) Executory contracts - the decision is dependent on the insolvency representative.*
- (e) Coordinated claims procedure*
- (f) Priorities & Preferences - vary in different jurisdictions and thus, might be difficult to reconcile.*
- (g) Avoidance Provisions - They also vary among systems. However, the premise of the law remains largely the same throughout.*
- (h) Discharge*
- (i) Private International Law issues.*

*A universalist approach, supported by harmonisation of laws, attempts to resolve these issues and is encouraged. However, the feasibility of the same is unknown.*

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<sup>15</sup> Fletcher, n 3

<sup>16</sup> Fletcher, n3

Question 3.3 [maximum 5 marks]

**What multilateral steps have been taken in the 21<sup>st</sup> century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.**

*The 21<sup>st</sup> century has seen an increasing rise in multilateral steps to promote harmonisation of domestic insolvency law -*

- (a) *Legislative Guide on Insolvency Law, 2004 - This can be considered as the single most important development of the 21<sup>st</sup> century. The Legislative Guide is available as a reference to all countries around the world that wish to update their insolvency legislation or review the existing ones. It deals with a wide range of issues, including enterprise groups and personal obligations of directors in and around the period of insolvency.*
- (b) *Principles for Effective Insolvency and Creditor/Debtor Regimes, 2000 - This was a predecessor to the Legislative Guide created by the World Bank. It has been updated several times and serves as guidelines for countries to review and revise their insolvency laws, particularly in cases where they need loan support from IMF or World Bank. Under this, the IMF or World Bank may refer the parties to the Legislative Guide and Principles so that a combined best practice can originate.*
- (c) *Harmonization of EU Law and EIR Recast 2015 - The EIR Recast essentially answers the choice of law question & regulates the law applicable to the proceedings.*
- (d) *American Law Institute NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases, 2000 - These have been made to unify recognition of laws and encourage cooperation and coordination of court processes. These were specifically created to facilitate the communication between USA, Canada & Mexico.*
- (e) *The European Guidelines on Communication & Cooperation 2007 - Contains draft rules for international insolvencies subjected to European Insolvency Law. It is largely focused on changes to Insolvency Regulation Recast as well as out-of-court restructuring, security rights, contracts, employment, fraudulent transactions, director's liability, simplifying cross-border communications and proceedings, etc.<sup>17</sup>*
- (f) *UNCITRAL Practice Guide on Cross border Insolvency Cooperation, 2009 - coordination and cooperation in cross-border insolvency cases, particularly with regard to the use and negotiation of cross-border insolvency agreements.*
- (g) *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment, 2018 - assists the countries in creating a framework where cross-border judgments can be implemented.*
- (h) *JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters & JIN Modalities of Court-to-Court Communication*

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<sup>17</sup> <https://www.ceril.eu/about-ceril/vision-and-purpose>

2016- *these guidelines and modalities govern the mechanics of cross-border insolvency in case of parallel proceedings.*

- (i) Cape Town Convention, 2001 - *Implemented under UNIDROIT to resolve the problem of obtaining rights to high-value aviation assets, namely airframes, aircraft engines and helicopters which, by their nature, have no fixed location.*<sup>18</sup>

*These multilateral developments play a major role in increasing efficiency and ensuring predictability and certainty. It provides a better recourse to creditors as harmonisation creates more efficient laws, and thus, the recovery is also effective. Additionally, since the treatment of claims varies in every jurisdiction, harmonised laws provide for uniform rules of priority. Harmonisation of laws also leads to, at least theoretically, a reduction in instances of forum shopping, as creditors cannot reach out to the most favourable jurisdiction. It reduces costs and encourages higher enterprise among States. However, the harmonization of laws is predicated on the idea of universality, and the drawbacks of universality apply to it as well. Nevertheless, in a globalised world where national boundaries are diminished owing to increase in trade and commerce among States, harmonisation is the key objective.*

*Further, court decisions in the Maxwell Communication Corporation<sup>19</sup> case McGrath v. Ridde/P<sup>0</sup> are encouraging for the harmonization approach.*

**There is scope to consider political pressure, foreign investor pressure and/or loan conditions.**

**4.5**

Marks awarded 14 out of 15

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

***Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.***

***Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.***

***If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.***

<sup>18</sup> <https://www.icao.int/sustainability/Pages/Capetown-Convention.aspx>

<sup>19</sup> 170 B.R. 800 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995).

<sup>20</sup> [2008] UKHL 21

Question 4.1 [maximum 5 marks]

**Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.**

*The Cross-Border Insolvency Act of any country plays a major role in implementing, enforcing, and recognising the orders given by foreign courts. In this case, Utopia has adopted the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI). This law mandates cooperation & direct communication between local courts and foreign courts or their representatives vide Article 15.*

*The following points are relevant and must be kept in mind -*

- (a) In cross-border cases, the domestic law of the country must contain provisions for recognition of foreign proceedings and give effect to them. Based on this provision, a liquidator may apply to the appropriate court to participate, initiate or halt a proceeding.*
- (b) Each domestic legislation applies the principles of private international law/conflict-of-law rules to identify the Choice of Forum, Choice of Law and Enforcement and recognition proceedings. These principles can impact the liquidators' ability to approach the courts.*
- (c) Principles of comity or cooperation may either be enshrined in the domestic legislation, or the country has ratified any international conventions or treaties to give effect to them. The liquidator must keep this in mind.*
- (d) The domestic law may lay down the requirements of the foreign liquidator to allow him to apply to the local courts to seek a remedy. The Model Law provides these conditions under Article 16.*
- (e) The domestic legislation reflects the approach of the country towards cross-border insolvency - universalism, territoriality, modified universalism, etc. Since Utopia has signed the Model Law, the question which is important is whether Erewhon is a signatory or not. Many times, the adoption of model law comes with a caveat of reciprocity. If Erewhon is a signatory of Model Law, the process of court-to-court communication and cooperation would be much smoother.*

*The liquidator is empowered to collect all tangible and intangible property of the company, but it is dependent on recognition provisions. In our case, the liquidator can approach the courts in Utopia. Since the claim for debt is governed by foreign law in this case, the courts of Utopia would require reference to Erewhon's law to establish the validity of the claim and then apply their own laws of procedure and substance.*

**The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.**

Question 4.2 [maximum 2 marks]

**Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?**

- (a) **Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.**
- (b) **Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.**

*In the first situation, a winding up petition has been filed in the court and an action is going to be initiated in Utopia, which means they are concurrent proceedings. In case of concurrent proceedings and under the MLCBI principles, the liquidator may apply to the State where the debtor has its 'centre of main interest' and seek relief from the local court. The proceedings which have started abroad become ancillary proceedings. It can adopt a similar pattern of cooperation as seen in the Maxwell case.*

**It would be beneficial to refer to Article 29**

1.5

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

**A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.**

**Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?**

**Choice of Country - India**

*An insolvency professional comes into the picture when insolvency is initiated against the CD by financial or operational creditors under the Insolvency & Bankruptcy Code, 2016. Once a resolution professional is appointed, he takes over the control and management of the CD and works towards accumulating the debtors' assets to ascertain its viability for restructuring and inviting resolution plans.*

*International Insolvency Provisions of the IBC are based on principle of reciprocity. The Central government is empowered to enter into agreements with foreign countries to*



*enforce the provisions of the Code, where reciprocal arrangements are made. An insolvency professional is empowered to apply to the National Company Law Tribunal (NCLT) to issue a letter of request to a country outside India to indicate that the insolvency professional must take action against assets situated in that jurisdiction. This is done only with countries where reciprocity operates. Since India has ratified MLCBI, the government has been empowered to make rules pertaining to issues of cross-border insolvency handled by the Insolvency professional.*

*So primarily, the Insolvency professional must check if -*

- (a) There are reciprocal arrangements with the other country - Section 234. If there are no reciprocal arrangements, they must apply as a foreign representative under the insolvency law provisions of that country.*
- (b) The foreign country must coordinate and cooperate with the Indian representative in navigating the tracing of assets. Focus on the domestic legislation to see if it contains any such provisions.*
- (c) Understanding the private international law rules of the jurisdiction where assets are situated.*
- (d) Understanding the approach (universalism/territoriality) taken by the country and whether they would allow such an action. A conservative country with territorial approach may not allow any such proceeding.*

**For another approach that is closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.**

4

Marks awarded 9.5 out of 15

**\* End of Assessment \***

**TOTAL MARKS AWARDED 41.5/50**

**A very good paper that generally addresses the questions asked and substantiates its answers.**